STATE OF MAINE

SUPREME JUDICIAL COURT
Sitting as the Law Court
Docket No. Cum-20-181

Avangrid Networks Inc., et al.

Plaintiffs—Appellants

v.

Secretary of State, et al.

Defendants—Appellees

On Appeal From the Order of the
Cumberland County Superior Court
Civil Action Docket No. CV-20-206

BRIEF OF AMICUS CURIAE

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STATEMENT OF FACTS

Amicus accepts the statement of facts laid out in the trial court's opinion, pages 3-5, under the headings "The Project," "The Citizens Initiative," and setting forth the Law Court's opinion in *Reed v. Secretary of State*, 2020 ME 57. Amicus further accepts the view of Plaintiffs—Appellees expressed in their Notice of Appeal, i.e., that all of the issues before this court raise questions of law capable of full and final resolution by the court. Finally, Amicus would note that though initiative and referendum powers are often spoken of as though they were head and tail of the same coin, Maine's Constitution contains some differing duties, and limitations in the provision dealing with referendum, Art. IV, Pt. 3, §17, than are contained in the provision dealing with initiative, Art. IV, Pt. 3, §18. Amicus and the parties to this proceeding are in seeming agreement that the issues presently before the court deal exclusively with the initiative (§18) provisions. Accordingly, arguments or analogies invoking the referendum provisions in the Constitution (except to note the constitutional status of both) are largely avoided in this brief.

HISTORICAL INFORMATION

Though Maine's Constitution declares that— "All power is inherent in the people"[1] that same document originally ceded the power to enact laws for the

[1] Maine Constitution, Art. 1, Declaration of Rights, §2.

benefit of the people to the Maine Legislature.[2] We existed as a state for 89 years without citizen initiative powers. In 1909 Maine's Constitution was amended to allow the people to take back, "…subject to the terms **and limitations** of the amendment, a power which the people vested in the Legislature when Maine became a state."[3]. Maine's 89 year existence without citizen initiative powers, and the fact that 23 sister states and the Federal government have never provided citizen initiative powers, makes clear that the existence of such powers is not an inherent or essential feature of democratic government.

ARGUMENT

1. Citizen Initiative Powers are Broad, but Limited

The key to resolving the issues now before the court is recognition of the fact that citizen initiative powers are no greater than those spelled out in Art. IV, Pt. 3, §18 of the Maine Constitution. In short, they include, and are limited to, the powers delineated in the authorizing constitutional provisions. Initiatives may not amend the Maine constitution; that prerogative is expressly barred by §18; *a fortiori* citizen initiative powers cannot be expanded by an artfully contrived initiative measure. If citizen initiative powers are to be expanded, that can only be accomplished by directly amending the constitution.

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[2] Maine Constitution, Art. IV, Pt. 3, §1.

[3] *Farris ex rel Dorsky v. Goss*, 60 A2d 908, 910 (Me. 1948).

The trial court asserts that: "This case does not present an instance where a procedure specified in the Constitution is inconsistent with the use of the initiative process."[4] That may well be true, but seems irrelevant to the matter at hand. This case does present an instance where the use of the initiative process is inconsistent with procedure[s] specified in the Constitution. As will be seen shortly, that is the crux of the argument being made by Amicus.

The trial court also asserts that: "The power of citizens to legislate by direct initiative is coextensive with the power of the Legislature." It is not. It is a more limited power. As noted, citizen initiatives may not propose constitutional amendments. Only the Legislature has that power. Further, *Wagner v. Secretary of State* [5] (a case cited by the trial court) makes clear that citizen initiatives may not authorize the issuance of bonds. Constitutional provisions dictate that only the Legislature has that power. Citizen initiatives may not intrude upon the power of the Legislature to pass "emergency" legislation. Citizen initiatives may not intrude upon the constitutional prerogatives of the Governor and Legislature to remove people from public office.

Aside from evidencing the fact that citizen initiative powers are limited, the *Wagner* case raises issues important to these proceedings. The issue before the

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[4] *Avangrid Networks Inc., et al v. Secretary of State, et al*, Sup. Ct. decision, Docket No. CV-20-206 at pg. 9.

[5] 663 A2d 564 (Me. 1995).

court in *Wagner* was whether the initiative being challenged was a back door attempt to amend the constitution. The *Wagner* trial court and the Law Court held that it was not. Importantly, however, both courts noted that: "On it face the proposed initiative legislation is not a constitutional amendment."[6] The inference of both courts in *Wagner* seems clear—had they found the initiative "on its face" to be violative of, a back door amendment to, the Constitution, they would not have allowed it to go to the voters.

2. The Initiative Before This Court Facially Violates Maine's Constitution

The 135-word initiative contains at least four violations (labeled A. through D. below), i.e., departures from the plain language in Art. IV, Pt. 3, §18 of the Maine Constitution, any one of which seemingly bars submission of the initiative to the voters. Cumulatively, the weight of the argument is increased. The initiated measure speaks for itself:

> Sec. 1. Amend order. Resolved. That within 30 days of the effective date of this resolve and pursuant to its authority under the Maine Revised Statutes, Title 35-A, section 1321, the Public Utilities Commission shall amend "Order Granting Certificate if Public Convenience and Necessity and Approving Stipulation," entered by the Public Utilities Commission on May 3, 2019 in Docket No. 2017-00232 for the New England Clean Energy Connect transmission project, referred to in this resolve as "the NECEC transmission project." The amended order must find that the construction and operation of the NECEC transmission project are not in the public interest and that there is not a public need for the NECEC transmission project. There not being a public need, the amended order must deny the request for a certificate of public need and necessity for the NECEC transmission project.

A. §18 begins by noting that: "The electors may propose to the Legislature for its

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[6] *Wagner*, 663 A2d at 567. The trial court's language (quoted by the Law Court) expresses a similar view: "On its face, it is not, [a back door constitutional amendment] it is only a statutory amendment."

consideration any bill, resolve or resolution…." The trial court referred to "proposed initiative legislation" over 20 times in its opinion. At the outset, one must note that labeling the initiative a "resolve" does not make the text a piece of "legislation." In fact, **it is not legislation.** Not a word in the initiative proposes new legislation to strengthen existing statutory provisions with respect to power line location, construction, maintenance, etc. Not a word repeals, amends or clarifies existing legislation with respect to power line siting, safety, etc. A 1971 *Opinion of the Justices* [7] approvingly cited *Farris v. Goss* stating that "..the people reserved to themselves power to propose laws and to enact or reject the same at the polls…" At another point the *Opinion* and *Farris* both spoke of the "…right of the people… to enact legislation…"[8] **But there is no new law, no proposed legislation in the initiative measure presently before this court.** The first, and fundamental requirement of the people's reserved right of initiative, i.e., that a proposed law be presented to the Legislature, has not been met; this facial violation of §18, without more, bars submission of the initiative to the voters. There is more.

B. §18 makes clear that a proposed law (the initiative legislation) is to be presented "…to the Legislature for its consideration… by written petition addressed to the Legislature or to either branch thereof…." That did not happen here. The clear intent of this constitutional mandate in the context of initiative presupposes that

[7] 275 A2d 800 (Me. 1971) at pg. 803.
[8] See *supra* note 3 at pgs. 910 and 911.

there is a proposed law to submit to the Legislature.[9] The drafters of the initiative measure knew there was no new law; they knew this constitutional requirement/ intent would not, could not be met. Even if the initiative (cited in full above) was formally or informally communicated to the Legislature,[10] the drafters of the initiative knew there was nothing capable of being meaningfully acted upon by the Legislature—nothing to enact or amend. That does not mean that the drafters of an initiative may simply waive/ignore the second of the two related constitutional requirements, i.e., that there be a proposed law, and that it be submitted "…to the Legislature for its consideration."

C. The initiative on its face and in its opening lines is directed to the Public Utilities Commission (PUC), a quasi-judicial regulatory body, an extension of the Executive branch of government. The decision of the drafters of the initiative to pursue this course tacitly acknowledges that there is no legislative (law making) content or purpose in this purportedly legislative initiative. More importantly, it must be seen that there is no constitutional language permitting this use of the people's power of initiative, permitting an initiative to be directed to an executive agency of government. In short, instead of complying with the two related

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[9] The purpose of the Constitutional requirement spelled out in the Maine Const. Art. IV, Pt. 3, §18, para. 2. is to give the Legislature the opportunity to enact the proposed law (without change) thus obviating the need for taking the proposal to the voters, or to allow the Legislature to pass an amended version of the proposed law, in which case both the people's ("the electors") original proposed law and the Legislature's amended version of same, would be presented to the voters.

[10] Presumably for political and/or informational purposes.

constitutional mandates noted above, the initiative (the drafter's own words) would direct the PUC, not the Legislature, to take action. This alternative course of conduct is not contemplated, delineated or permitted in Art. IV, Pt. 3, §18 of the Constitution, or in any other provision of the Constitution. It is a course of conduct that impermissibly expands the people's power of initiative. *Ergo*, the facial language of the initiative bars its submission to the voters.

D. The initiative, its express wording, orders the PUC to reverse ("shall amend") its order granting a Certificate of Convenience and Necessity for Avangrid's NECEC transmission project. Further initiative language makes clear that:

> "The amended order **must find** that the construction and operation of the NECEC transmission project are not in the public interest and that there is not a public need for the NECEC transmission project"[11]

Quite apart from any separation of powers arguments raised by this purportedly legislative mandate to the PUC (an executive arm of government) to reverse its findings and prior order, Amicus would again note that there is no language in Art. IV, Pt. 3, §18 of the Constitution, or in any other provision of the Constitution that hints at, implies, much less permits, such an order. This use of initiative powers to directly order an executive agency to reverse its prior findings and its final order is without precedent in Maine's use of initiative; it is a facial expansion of the constitutional powers of initiative presently embodied in §18, and as such its submission to the voters is barred.

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[11] See full text of the challenged initiative, *supra* pg. 4.

3. Facial Challenges to Initiatives Bear a Heavy Burden But, To Protect the Constitutional Integrity of the Initiative Process, They Must Be Judicially Cognizable.

Once it is recognized that the scope of citizen initiative powers is not as broad as the Legislature's "…full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State…"[12] it follows (as documented in the *Wagner* case) that particular initiatives and referendums must sometimes be barred, cut off. [13] This arises from the fact that these powers though constitutionally predicated are at the same time "limited" by the very constitution that gave rise to these initiative and referendum powers.[14] *Morris v. Goss* [15] (cited in *Wagner*) affords a perfect example. The people's constitutional right to subject a legislative enactment to referendum, Art. IV, Pt. 3, §17 conflicted directly with the Legislature's right to characterize an enacted law as an "emergency" measure, Art. IV, Pt. 3, §16. The court barred the referendum.

> "This Court has never hesitated to exercise its power and authority to protect the individual from an unconstitutional invasion of his rights by the legislative branch of government. By the same token it is now our duty to prevent the people from interfering in an unconstitutional manner with the constitutional exercise by the Legislature of the [emergency] powers conferred upon it by the Constitution."[16]

Note: The *Morris* court characterizes the prohibited effort to use citizen referendum

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[12] Maine Constitution, Art. IV, Pt. 3, §1.
[13] See *supra* pgs. 3-4.
[14] See *supra* pg. 1 note 3 and accompanying text. The complete *Farris ex rel Dorsky v. Goss* citation, 60 A2d at 910, says: "In short, the sovereign which is the people has **taken back**, **subject to the terms and limitations of the amendment,** a power which the people vested in the legislature when Maine became a state."
[15] 83 A2d 556 (Me. 1951).
[16] Id. at 565.

powers in the above context as "unconstitutional".

A point made earlier in this brief bears repeating. The inference at both the trial and appellate level in *Wagner* seems clear—had they found the initiative "on its face" to be a back door amendment to the Constitution, a clear violation of the Constitution, they would not have allowed it to go to the voters.

With that point in mind Amicus would point to a 2017 *Opinion of the Justices* [17] growing out of Maine's Ranked-Choice Voting Law. Unlike the initiative presently before this court, Maine's ranked-choice voting proponents in October, 2015 presented to the Secretary of State a real piece of legislation directed to the Legislature for its consideration, and 70,000 signatures; more than the requisite number were declared valid. The Legislature did not pass the proposed legislation; there was considerable political resistance to the initiated measure. In March 2016 an AG's Opinion declared that certain provisions in the proposed law conflicted with "plurality" provisions in Maine's constitution, but no Opinion of the Justices was timely sought, and no case was brought challenging the initiative on these grounds. The initiative went to, and was approved by, the voters in November, 2016. A key provision in the now Ranked Choice Voting Law was its effective date, January 1, 2018. This meant that no election involving candidates subject to the provisions of the law would take place before November, 2018.

[17] 2017 ME 100

The window of time between November 2016 and November, 2018 afforded the Maine Senate the opportunity, before any of the substantive provisions of the law would become operative, to seek an *Opinion of the Justices* with respect to the seeming inconsistency between provisions in the Ranked Choice Voting Law and provisions in Maine's Constitution with respect to the election of the Governor, and members of the Maine House and Senate. Three related questions were propounded and an *Opinion* was sought in February 2017. After briefing and argument in March/April, 2017, the Law Court in May, 2017 rendered an *Opinion*. Notwithstanding the usual practice of Maine courts to stay constitutional challenges to citizen initiated laws to a future date that presented a live case or controversy, the Court "opined" that the provisions in the Ranked Choice Voting Law were facially inconsistent with provisions in the Maine Constitution—in a word they were, unconstitutional. As a consequence, the Ranked-Choice voting provisions were, in fact, not used in the 2018 elections. The election of a Governor, Representatives, and Senators went smoothly pursuant to the constitutional provisions noted in Senate question 2—that question had put the issue squarely to the Court:

> "Does the method of ranked-choice voting established by the Act in elections for Representative[s], Senator[s] and Governor **violate** the provisions of the Constitution of Maine, Art. IV, Pt. 1, §5, Art. IV, Pt. 2, §§ 3 and 4, and Art. V, Pt. 1, §3 respectively…"[18]

The Court's *Opinion* in [¶68] summed it up tersely: "We therefore answer Question

[18] See *Opinion of the Justices*, 162 A3d 188 at pg. 196.

2 in the affirmative.[19]

Given the fact that the inconsistency (between initiative provisions in this case, and provisions in Art. IV, Pt.3, §18) is as palpable as those that confronted the court in the ranked–choice voting case, one hopes for a similar outcome in this proceeding.

Beyond striking down provisions in the Ranked Choice Voting Law before they became operative, the *Opinion* is noteworthy because it affirms the view that legislative initiatives have limits—initiatives cannot avoid compliance with existing constitutional provisions. An early paragraph [¶8] in the *Opinion* makes that point clear: "Nonetheless, when a statute—including one enacted by citizen initiative—conflicts with a constitutional provision, the constitution prevails." Argument 2 above,[20] lays out similar direct conflicts between the purported legislative initiative now before this court and the language in §18. Again, one hopes Maine's Constitution will prevail.

The Justices in promulgating the *Opinion* noted in [¶59] that "… a party challenging the facial constitutionality of a statute…" has a heavy burden; that "…facial constitutional challenges are disfavored…." That is as it should be. Amicus has argued that the separate points **A** to **D** in Argument 2 more than meet

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[19] [¶69] affirmatively stated the Court's justification for its central conclusion: "… we have unanimously opined that the Ranked-Choice Voting Act is in direct contradiction to the plurality requirements of the Maine Constitution…." The paragraph ended by stating there was no need to answer Questions 1 and 3.

[20] See *supra* pgs. 4-7.

that burden. Moreover, paragraph [¶59] makes clear that a party may facially challenge a statute (or, as here, an initiative that exceeds the constitutionally granted powers of initiative). And the term "disfavored" clearly does not mean prohibited—facial challenges to constitutional violations are not prohibited. No Maine case so holds.

Finally, the Justices in deciding that providing an *Opinion* was appropriate, and "…in the absence of a case or controversy,"[21] imposed stringent "Standing," "Important Question of Law," and "Solemn Occasion" requirements on themselves.[22] These requirements (to the extent that they are germane to this proceeding) have been as, or more fully, met here. The standing of plaintiffs/ appellants seems irrefutable; the fact that only questions of law are raised seems clear and has been agreed to by all parties; the unusual, exigent character of the circumstances giving rise to this initiative seem clear; and the fact that these issues are not hypothetical but at the same time "not overly complex," not beyond the capacity or jurisdiction of the court seems equally clear.

In short, the 2017 *Opinion of the Justices* is an appropriate guide; it strongly suggests not only that provisions in an initiative may be facially challenged, but that when the unconstitutionality is clearly demonstrated (as is the case here) voters, democratic electoral processes (as was the case with respect to the Ranked-Choice

[21] See 2017 ME 100 [¶18].
[22] See 2017 ME 100 [¶¶19-30].

Voting Law) should not be burdened, confused or disappointed by impermissible initiative provisions.

CONCLUSION

Defendants/Appellees made much of §18, paragraph 2 at the trial court level of these proceedings, i.e., the "shall" clause, "…shall be submitted to the electors [voters]". They have presumably raised this clause again in briefs to this court. A full reading of paragraph 2, however, makes clear that what must go to the voters is a piece of legislation, i.e., "The measure thus proposed, unless enacted without change by the Legislature at the session at which it is presented shall be submitted to the electors…"[23] But that is the rub. That is what gives rise to this proceeding. That is the heart of Plaintiffs/Appellants argument. It is the Achilles heel of Defendants/Appellees position. **The 135 word initiative before this court is not a piece of legislation**. There is nothing for the Legislature to consider, nothing to legally enact, or to amend, and thus nothing for the "electors"/voters to vote on. In short, the "shall" clause is irrelevant because there is no legislation.

This initiative's failure to offer legislation is the single most egregious violation of Art. IV, Pt. 3, §18. It renders the initiative unconstitutional. The fact that the initiative proceeds to order the PUC, a quasi-judicial executive agency, to reverse its order permitting Avangrid's NECEC project, only compounds the facial

[23] Maine Constitution, Art. IV, Pt. 3, §18, paragraph 2.

constitutional errors contained in this initiated measure. Beyond the very real separation of powers problems this order poses,[24] the order is well beyond the constitutional powers of initiative outlined in §18, and accordingly this initiative should not be sent to the voters. Amicus urges this court to so hold.

July 13, 2020

Respectfully Submitted,

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[24] Amicus would concur with the separation of powers arguments other plaintiffs/appellants have no doubt raised in their briefs. These arguments trace back to *Lewis v. Webb*, 3 Me. 326 (1825) and are said to be the cornerstone of our democratic form of government. Amicus would argue that breaches of funda-mental separation of powers principles (even when wrapped in the fine clothes of an initiative) may be so bold, so egregious, such a facial departure from norms in the proper/constitutional exercise of the powers of initiative as to warrant being seen as a justification for not sending the errant initiative to the voters.

CERTIFICATE OF SERVICE

I, Orlando E. Delogu, hereby certify that on or before July 13, 2020 two copies of the brief of Amicus, Orlando E. Delogu, on behalf of Plaintiffs—Appellants in the docketed Law Court case #Cum-20-181 Avangrid Networks, Inc., et al. v. Secretary of State, et al. have been hand delivered or sent by first class U. S. mail, postage prepaid, to each of the attorneys (shown below) on the Notice of Service list promulgated by the Court. Additionally, a single copy of the brief has (at the same time) been sent electronically to Mathew Pollack, Clerk, Maine Supreme Judicial Court.

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